**LINK: 53, 54**

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

**CIVIL MINUTES - GENERAL**

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| Case No. | CV 14-2004 GAF (FFMx) | Date | September 24, 2014 |
| Title | JP Hyan v. Liberty Surplus Insurance Corporation et al | | |

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|---|---|
| Present: The Honorable | **GARY ALLEN FEESS** |

| | | |
|---|---|---|
| Stephen Montes Kerr | None | N/A |
| Deputy Clerk | Court Reporter / Recorder | Tape No. |

| | |
|---|---|
| Attorneys Present for Plaintiff: | Attorneys Present for Defendant: |
| None | None |

**Proceedings:** **(In Chambers)**

**ORDER RE: ANTI-SLAPP MOTION & MOTION TO DISMISS**

## I. INTRODUCTION

The past four years have brought J.P. Hyan ("Hyan") into uncomfortably regular contact with his former lawyers. This ordeal began in 2010, when Hyan filed a malpractice suit against their law firm—Rutter Hobbs & Davidoff ("RHD")—in California state court. RHD eventually settled for $7.5 million, which was to be paid by its insurance carriers.

Settlement, however, did not resolve the dispute. As it turned out, Hyan was not the only potential claimant under the firm's malpractice policies. As a result of that complication, Hyan has now spent the past several years trying to collect. To this end, he filed the present action in February 2014, naming everyone from RHD to the insurance carriers to other policy claimants as Defendants. Only a small sliver of this dispute is now before the Court.

When Hyan sued RHD, RHD filed a counterclaim. (Docket No. 48 [First Am. Counterclaim ("FACC")].) Without providing any specific details, the counterclaim asserts that Hyan had breached a contract—the settlement agreement. Hyan, now a counter-Defendant, has filed two pending motions in an effort to dismantle this allegation. First, he has moved to dismiss the counterclaim, pointing out that RHD did not indicate *how* he breached the settlement agreement. (Docket No. 53 [Mot. to Dismiss ("Dismiss Mem.")].) Second, he has filed an anti-SLAPP motion to strike the counterclaim. (Docket No. 54 [Anti-SLAPP Mot. to Strike ("Strike Mem.")].) Though the counterclaim is vague, Hyan believes that it stems from the simple fact that he sued RHD to enforce the $7.5 million settlement terms. That is, he believes that filing

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the current action was the only manner in which he supposedly breached the settlement agreement. If so, the counterclaim would likely "arise from" protected speech—a petition filed with a court—and potentially be subject to an anti-SLAPP motion.

Because of the vagueness of RHD's allegations, the Court cannot determine whether the counterclaim in fact arises out of Hyan's lawsuit. While this means that the anti-SLAPP motion cannot be granted, the day is not entirely lost. Since the Court is unable to divine *how* Hyan allegedly breached the settlement agreement, the motion to dismiss must be **GRANTED**. The anti-SLAPP motion is **DENIED**. The Court sets forth its reasoning, in further detail, below.

## II.
## BACKGROUND

In January 2010, J.P. Hyan filed a lawsuit against RHD—his former lawyers' firm—alleging that it had committed malpractice. (FACC ¶ 1.) The case was brought in Los Angeles County Superior Court and eventually went to trial. (Id.) After receiving an unfavorable verdict, RHD settled Hyan's claims for $7.5 million. (Id.) As RHD saw it, the terms of the settlement entitled Hyan to $5 million from one of RHD's malpractice insurance carriers, and $250,000 from another. (Id.)

But, so far, neither RHD nor the insurance carriers have paid Hyan anything. (Id.) While the FACC only hints at the reason, the explanation for this failure appears simple: other claimants came forth, and the policies could not cover them all. (Id. ¶ 15.) Nevertheless, RHD maintains that it has "complied with all requirements and conditions in its settlement agreement with Hyan." (Id. ¶ 12.) By contrast, RHD says, Hyan "has breached the Hyan-RHD settlement agreement by attempting to force RHD to engineer a release of all of the [insurance proceeds]."[1] (Id. ¶ 15.) Without providing any further details, RHD asserts that "Hyan's actions constitute a material breach of the Hyan-RHD settlement agreement." (Id. ¶ 16.)

Hyan has now filed a motion to dismiss this claim, as well as a motion to strike it pursuant to California's anti-SLAPP statute. (Dismiss Mem.; Strike Mem.) In conjunction with the motion to strike, he also included a copy of the settlement agreement undergirding the dispute. (Docket No. 59 [Settlement Agreement].) The agreement was filed under seal, (see Docket No. 57 [Appl. to Seal Agreement]), and the Court will therefore avoid reference to specific language of the agreement in this order. This is possible because nothing in the

[1] Specifically, RHD indicates that Hyan sought a release of greater than $250,000 from the second insurance carrier. (FACC ¶ 15.)

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settlement agreement itself informs the inquiry into the origins of RHD's counterclaim. That is, RHD's counterclaims "arise from" something, and the settlement agreement does not reveal what that something is. Accordingly, the Court's discussion of this issue will rely principally upon the FACC for context.

## III.
## DISCUSSION

### A. Legal Standards

#### 1. Motion to Dismiss

A complaint may be dismissed if it fails to state a claim upon which relief can be granted. See Fed. R. Civ. P. 12(b)(6). On a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), a court must accept as true all factual allegations pleaded in the complaint, and construe them "in the light most favorable to the nonmoving party." Cahill v. Liberty Mut. Ins. Co., 80 F.3d 336, 337–38 (9th Cir. 1996); see also Stoner v. Santa Clara Cnty. Office of Educ., 502 F.3d 1116, 1120–21 (9th Cir. 2007). Dismissal under Rule 12(b)(6) may be based on either (1) lack of a cognizable legal theory, or (2) insufficient facts under a cognizable legal theory. SmileCare Dental Grp. v. Delta Dental Plan of Cal., Inc., 88 F.3d 780, 783 (9th Cir. 1996) (citing Robertson v. Dean Witter Reynolds, Inc., 749 F.2d 530, 534 (9th Cir. 1984)).

Under Rule 8(a)(2), a complaint must contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). The Supreme Court has interpreted this rule to allow a complaint to survive a motion to dismiss only if it "contain[s] sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007)). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Id. (citing Twombly, 550 U.S. at 556). "[W]here the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct," the complaint has not sufficiently established that the pleader is entitled to relief. Id. at 679.

A complaint generally need not contain detailed factual allegations, but "a plaintiff's obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." Twombly, 550 U.S. at 555 (citation, alteration, and internal quotations omitted). Similarly, a court need not "accept as true allegations that are merely conclusory, unwarranted deductions of

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fact, or unreasonable inferences." Sprewell v. Golden State Warriors, 266 F.3d 979, 988 (9th Cir. 2001). That is, "the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions . . . . While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations." Iqbal, 556 U.S. at 678–79; see also Warren v. Fox Family Worldwide, Inc., 328 F.3d 1136, 1139 (9th Cir. 2003).

As a general rule, a court should freely give leave to amend a complaint that has been dismissed. Fed. R. Civ. P. 15(a). A court may deny leave to amend when "the court determines that the allegation of other facts consistent with the challenged pleading could not possibly cure the deficiency." Schreiber Distrib. Co. v. ServWell Furniture Co., 806 F.2d 1393, 1401 (9th Cir. 1986); Roque v. Wells Fargo Bank N.A., 2014 WL 904191 (C.D. Cal. Feb. 3, 2014).

**2. ANTI-SLAPP MOTION TO STRIKE**

California's anti-SLAPP statute, codified at Section 425.16 of the California Code of Civil Procedure, was borne out of the Legislature's finding that "there has been a disturbing increase in lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances." Cal. Civ. Proc. Code § 425.16(a). In light of that finding, the statute provides that:

> A cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech under the United States or California Constitution in connection with a public issue shall be subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim.

Cal. Civ. Proc. Code § 425.16(b)(1).

The statute thus has two components. First, the plaintiff's cause of action must "arise from" an act of the defendant which was in furtherance of the defendant's right of petition or free speech. In this first step, the defendant bringing the anti-SLAPP motion "has the burden of making a prima facie showing" that the lawsuit arises from a protected activity under the statute. Dixon v. Superior Court, 30 Cal. App. 4th 733, 742 (1994) (internal citation omitted). If the defendant does so successfully, the burden shifts to the plaintiff to demonstrate that he will probably prevail on the claim at trial. Evans v. Unkow, 38 Cal. App. 4th 1490, 1496 (1995).

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In evaluating the first prong, "the critical point is whether the plaintiff's cause of action itself was *based on* an act in furtherance of the defendant's right of petition or free speech." City of Cotati v. Cashman, 29 Cal. 4th 69, 78 (2002) (emphasis in original). "A defendant meets this burden by demonstrating that the act underlying the plaintiff's cause fits one of the categories spelled out in section 425.16, subdivision (e)." Id. Those categories are:

> (1) any written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law, (2) any written or oral statement or writing made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law, (3) any written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest, or (4) any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest.

Cal. Civ. Proc. Code § 425.16(e).

If a defendant shows that one of these four categories applies, the court undertakes a further inquiry, evaluating whether the plaintiff has demonstrated that he will probably prevail on the claim at trial. Evans, 38 Cal. App. 4th at 1496. For the second step, "in order to establish the requisite probability of prevailing, the plaintiff need only have stated and substantiated a legally sufficient claim." Navellier v. Sletten, 29 Cal. 4th 82, 88 (2002) (citations and quotation marks omitted).

California's "anti-SLAPP statute was enacted to allow for early dismissal of meritless first amendment cases aimed at chilling expression through costly, time-consuming litigation." Metabolife Int'l, Inc. v. Wornick, 264 F.3d 832, 839 (9th Cir. 2001). "Thus, a defendant's rights under the anti-SLAPP statute are in the nature of immunity: [t]hey protect the defendant from the burdens of trial, not merely from ultimate judgments of liability." Batzel v. Smith, 333 F.3d 1018, 1025 (9th Cir. 2003). "Because California law recognizes the protection of the anti-SLAPP statute as a *substantive* immunity from suit," a federal court sitting in diversity must do so as well. Id. (citing Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938)).

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## B. APPLICATION

There are two motions pending before the Court: (1) a motion to dismiss, pursuant to Federal Rule of Civil Procedure 12(b)(6); and (2) a motion to strike, pursuant to California's anti-SLAPP statute. The Court will address both motions, in turn.

### 1. MOTION TO DISMISS

In his motion to dismiss, Hyan attacks RHD's breach of contract claim. (Dismiss Mem. at 3–5.) For this cause of action to survive such a motion, a plaintiff—or, as here, a counterclaimant—must allege: "(1) existence of the contract; (2) plaintiff's performance or excuse for nonperformance; (3) defendant's breach; and (4) damages to plaintiff as a result of the breach." CDF Firefighters v. Maldonado, 70 Cal. Rptr. 3d 667, 679 (Ct. App. 2008).

The Parties apparently agree that some contract actually existed. (FACC ¶ 14; see Dismiss Mem. at 3.) Beyond that, RHD's pleading falls woefully short of the standard imposed by Twombly and Iqbal. First, it does not describe RHD's "performance or excuse for nonperformance" of contractual obligations. CDF Firefighters, 70 Cal. Rptr. 3d at 679. Critically, while RHD maintains that it "complied with all requirements and conditions in [the] settlement agreement," it never specifies what those conditions were.[2] (Id. ¶¶ 1, 12.) And conclusory allegations that a party has complied with unspecified contractual provisions are insufficient to defeat a motion to dismiss. See Iqbal, 556 U.S. at 678–79 ("While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations."); Sprewell, 266 F.3d at 988 (a court need not "accept as true allegations that are merely conclusory").

Second, the Court cannot determine from the FACC precisely—or even generally—how Hyan might have breached the settlement agreement. The sum total of allegations concerning this breach indicate that Hyan "attempt[ed] to force RHD to engineer a release of all [insurance] funds . . . when doing so could potentially cause RHD to breach its obligations to [other insurance claimants]." (FACC ¶ 15.) But RHD never specifies what this means, or what Hyan actually did. (See Docket No. 63 [Opp. to Mot. to Dismiss ("Dismiss Opp.")].) For instance,

[2] The closest RHD comes to providing this information is a statement that the "settlement agreement entitles Hyan to the entirety of the $5 million [] policy and to a maximum of $250,000 of the [other] policy." (FACC ¶ 1.) Since Hyan has not received either sum, (id. ¶ 1), RHD cannot mean to imply that it has fulfilled this portion of the settlement agreement. Likewise, RHD does not rely upon interference by other claimants to argue that performance has become impossible.

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what did he do in his "attempt to force" RHD's hand? Other than asking for money owed to him—something surely allowed under any such contract, and certainly not in violation of the agreement as described by RHD—the FACC does not describe a single action taken by Hyan in connection with the settlement agreement. (See FACC ¶ 15.)

RHD has attempted to turn this silence into a virtue, admitting that it "does not specify the exact actions" giving rise to the contractual breach. (Dismiss Opp. at 4.) Instead, it wishes to "flesh out the various actions" giving rise to their complaint during discovery. (Id.) But, after Twombly and Iqbal, that is no longer how litigation proceeds. Legal conclusions—such as the claim that Hyan breached a contract—divorced from factual allegations or descriptions of conduct cannot support a claim for relief.

Third, RHD has failed to plead the last element of a breach of contract claim; that is, it has not properly alleged damages. CDF Firefighters, 70 Cal. Rptr. 3d at 679. In fact, it seems improbable that RHD could do so. By its own description, the settlement agreement did not obligate Hyan to pay RHD anything. (FACC ¶ 1.) And RHD apparently did not take any detrimental action based on Hyan's efforts to secure his money. (Id. ¶ 15) (describing how Hyan *attempted* to influence RHD's conduct.) That is, for all Hyan's supposed efforts to get his settlement money, nothing happened. At least as the FACC currently reads, RHD's position has not changed as a result of Hyan's actions.

Since RHD has failed to plead three critical elements of its breach of contract claim, Hyan's motion to dismiss the claim must be **GRANTED**.

### 2. ANTI-SLAPP MOTION

In light of the Court's analysis above, Hyan's anti-SLAPP motion can be dealt with briefly. The first step of an anti-SLAPP inquiry requires that a defendant "mak[e] a prima facie showing" that the lawsuit arises from a protected activity under the statute. Dixon, 36 Cal. Rptr. 2d at 694. Among other things, the defendant will prevail if she can show that "the act underlying the plaintiff's cause" is based upon any "statement or writing made in connection with an issue under consideration or review by a . . . judicial body." Cal. Code Civ. Proc § 425.16(e). In deciding whether the initial "arising from" requirement is met, a court considers "the pleadings, and supporting and opposing affidavits stating the facts upon which the liability or defense is based." Id. § 425.16(b)(2).

As described above, the pleadings are little help in determining the act upon which RHD's claim is based. Hyan believes that the counterclaims are simply a response to the filing

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of his original complaint—which would likely qualify as a protected activity—but there are neither "supporting [nor] opposing affidavits stating the facts upon which" this belief is based. Id. In fact, only three pieces of external evidence are before the Court. First, the settlement agreement itself, which has nothing to say regarding the supposed breach. (Settlement Agreement.) Second, two declarations filed by Hyan's attorneys, indicating that they complied with the meet and confer requirements of the local rules. (Docket No. 66 [Rankin Decl.] and Docket No. 55 [Smith Decl.].) And third, one declaration filed by RHD's counsel, objecting to Hyan's description of the meet and confer process. (Docket No. 63-1 [Sinclair Decl.].)

An anti-SLAPP motion permits the Court to review evidence outside the scope of the pleadings. Even doing so, though, nothing more about RHD's claim can be determined than what was written in the FACC. And, as described above, the FACC is unclear regarding the premise of RHD's breach of contract claim. Whether it arises from Hyan's own judicial proceedings remains an uncertain proposition.

Accordingly, Hyan has not met his prima facie burden of showing that the breach of contract claim against him arises from a protected activity. The anti-SLAPP motion must therefore be **DENIED**.

## IV.
## CONCLUSION

For the foregoing reasons, Hyan's motion to dismiss only the breach of contract claim is **GRANTED**. However, RHD shall be permitted **leave to amend**, so that it may have the opportunity to more fully describe the facts underlying its claim. Any amendment must be filed no later than **Friday, October 10, 2014**. Because the Court cannot sufficiently determine the nature of RHD's breach of contract claim, let alone its origin, the anti-SLAPP motion must be **DENIED**. However, should RHD choose to amend its complaint, this motion may be renewed.

**IT IS SO ORDERED.**